

HOW THE KING'S BENCH ^{CL}
CAME TO TORONTO

BY

THE HONOURABLE WILLIAM RENWICK RIDDELL
LL.D., F.R.S., Can., &c.

Justice of the Supreme Court of Canada

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Justice of the Supreme Court of ~~Canada~~ *Ontario*

In 1794 the first Legislature of the Province of Upper Canada in its third Session, abolished the four Courts of Common Pleas, which had been established by Lord Dorchester in 1788 with full civil jurisdiction — one for each of the four Districts, Lunenburg, Mecklenburg, Nassau and Hesse, into which he divided the territory afterwards to become Upper Canada, but in 1788 still part of the enormous Province of Quebec, created by the Quebec Act of 1774, 14 George III, c. 83.

While the Canada (or Constitutional) Act of 1791, 31 George III, c. 31, provided for the government of the two Provinces, Upper Canada and Lower Canada, into which the Province of Quebec was provided, "did not interfere with the existing Courts which continued in full vigour."¹

The French Canadian law in civil cases, which had been in force from and after the Quebec Act of 1774, was replaced in the Province of Upper Canada in 1792 by the first Act of the First Parliament, 32 George III, c. 1 (U.C.).² All questions of fact, damages, etc., were directed to be tried by a jury by the second Act, (1792), 32 George III, c. 2 (U.C.), and in 1794 the judicial system of the Province was brought into line with the system in England.

The Judicature Act (or King's Bench Act) of 1794, 34 George III, c. 2 (U.C.), established a Court of King's Bench for the Province "with all such powers and authorities as by the law of England are incident to a Superior Court of civil and criminal jurisdiction." This was the original Superior Court of Common Law

¹ The proceedings in these Courts so far as extant were published by the Ontario Archives last year.

² The criminal law of England which had been introduced into conquered Canada by the Royal Proclamation of October 7, 1763, was not interfered with by either the Quebec Act or the Canada Act.

with Provincial jurisdiction—and it has been in substance continued in various forms until now it is merged in the present Supreme Court of Ontario.

The Court of King's Bench was to be "holden in a place certain," that is in the city, town or place where the Governor or Lieutenant-Governor shall usually reside, and until such place be fixed, the said Court shall be holden at the last place of meeting of the Legislative Council and Assembly."

When Upper Canada began her Provincial life, the Definitive Treaty of 1783 between the Mother Country and her revolted colonies, now become the United States of America, had fixed the dividing line between their territories at the middle line of the Great Lakes and connecting rivers: but the United States had agreed that there should be no legal obstruction to the recovery by British creditors of their claims against American debtors in full. Certain of the States had passed legislation which prevented this being done and refused to repeal it; the United States could not carry out their agreement, and Britain kept possession of the lake and river forts—Michillimackinac, Detroit, Buffalo, Niagara (east of the River Niagara), Oswegatchie, &c., &c. Simcoe, the first Lieutenant-Governor of Upper Canada, selected as his temporary residence and as the temporary Capital of the Province, the little hamlet West Niagara, Nassau, Butlersbury—it had all these names and more—he renamed it Newark, from Newark in New Jersey, with which he had been acquainted during the Revolutionary War, and called the Legislature together at that place, now the beautiful and interesting town of Niagara-on-the-Lake. That being the "place of meeting of the Legislative Council and Assembly," the Court of King's Bench must sit there. Osgood, our first Chief Justice, never sat in

³ Everyone will remember the provision of Magna Carta, Cap. XVII—"Commune placita non sequantur curiam nostram sed teneantur in aliquo certo loco"—the provision as to the place of holding the Court of King's Bench in Upper Canada is in sec. 1 of the Act, *ad fin.*

⁴ The "United States of America" could not at that time be spoken of as an entity in the singular; it is only of comparatively recent years that the United States can be spoken of as "it"—I think the present President was the first to use the pronoun "she" of his country.



the Court of King's Bench; he left for Lower Canada immediately after the passing of the Act and became Chief Justice of that Province.

The Court of King's Bench was to consist of the Chief Justice of the Province and two puisne justices. William Dummer Powell (afterwards Chief Justice of the Province), who was the first and only Judge of the Court of Common Pleas for the District of Hesse, with his residence at Detroit, and the place of sitting of his Court at L'Assomption (now Sandwich), was appointed a Puisne Justice and came to Newark. No other puisne justice was appointed for four years, and a new Chief Justice did not arrive till 1796; but there was at Newark an officer of the Crown willing and ready to take any office so long as there was money in it, and quite irrespective of any qualifications on his part. The Honourable Peter Russell, the Receiver-General,⁵ who was so ignorant of law that he expressed his wonder at there being an even number on the jury, received from time to time a temporary commission to sit as a puisne justice and until January, 1797, Powell, sometimes alone and sometimes with Russell, held Court at Newark.

But from the first it was understood that the territory to the right of the middle line of the Lakes and Rivers would be given up to the United States; and Simcoe set himself to determine a permanent capital. He fixed a site at the Forks of the La Tranche River—the River was renamed the Thames, and the site of the proposed capital, London—Simcoe rather expected that the Province would ultimately be divided and London be the Capital of the Western part. He was led to select this place from its distance from the American border—the citizens of the new Republic were truculent, and there was always a real danger of their invading the British Province, a danger which became actual in 1812.

⁵ The current gibe ran that Russell was called Receiver-General because he was generally receiving; all the contemporary correspondence, etc., indicate that if he was not receiving at any time, it was because there was nothing to receive.



Simcoe recognized that a naval station was necessary and he selected Toronto, which he renamed York in honour of the Duke of York, then showing some military talent in the Low Countries.

In 1794, Washington sent John Jay, the Chief Justice of the United States, to London to arrange the differences now becoming somewhat acute between the two countries; and late in that year a Treaty was negotiated whereby (*inter alia*) the United States were to pay the claims of the British creditors,⁶ and Britain was to give up the retained territory and posts by August, 1796.

It therefore became necessary to remove the Capital of the Province: so long as Newark was protected by British guns in the Fort across the River it was safe, but the case was quite different when the guns became American.

London could not be adopted for the Capital at the time: there were no roads, no way of getting to and out of it except through the primeval forest. In those days, water communication was practically the only means of access in summer and the lakes were the real King's highway.

Simcoe with the consent of the Home authorities, and early in 1796, selected York as the Capital for the time being,⁷ and directed the removal of the officers of the Crown to that place with convenient speed. He left the Province for England on leave of absence in July, 1796, and Peter Russell became Administrator of the Government. Before Simcoe left the Province he dissolved Parliament and issued writs for a General Election—much to the discontent of Russell, who was thereby deprived of the fees which were paid at that time to His Majesty's Representative for such services—for Russell "needed the money." Simcoe left instructions that the new Parliament should be called together at York—this of course would necessitate the

⁶ Ultimately arranged at £600,000.

⁷ It is a mistake to suppose as some have done that Simcoe intended York to be the permanent Capital: he never abandoned his idea that London should have that honour. This is made abundantly manifest by the correspondence in the Canadian Archives.



removal of the Court of King's Bench to that place at the Term following the Session. John Elmsley, the second Chief Justice, arrived at Newark in November, 1796. Without ever seeing York or knowing anything of it except what he was told by the Newark people, he took a most implacable prejudice against it, and declared openly that he would never build a residence there; Elmsley is described⁹ as "a man of conciliating manners when he pleases and of an agreeable eloquence and much acquired information, but unfortunately too impetuous and apt to be hurried on by every first impulse, which often leads him into expressions and acts that on cooler reflection he repents of."

His objections to York were, however, well founded—Russell says,¹⁰ "At present York is in a manner isolated, being cut off by the want of roads from an easy land communication with the rest of the Province. It has no jail, no houses for the meeting of the Legislature,¹¹ none for the Courts of justice, nor even offices for the Departments. Our dependence rested solely on the Queen's Rangers for assistance to raise these necessary buildings, make bridges, cut roads of communication, &c. The detachments taken from thence by Lord Dorchester's orders reduced this assistance to 100 men, and Major Shank finding himself incapable of transporting the Indian stores, now calls for 30 more."

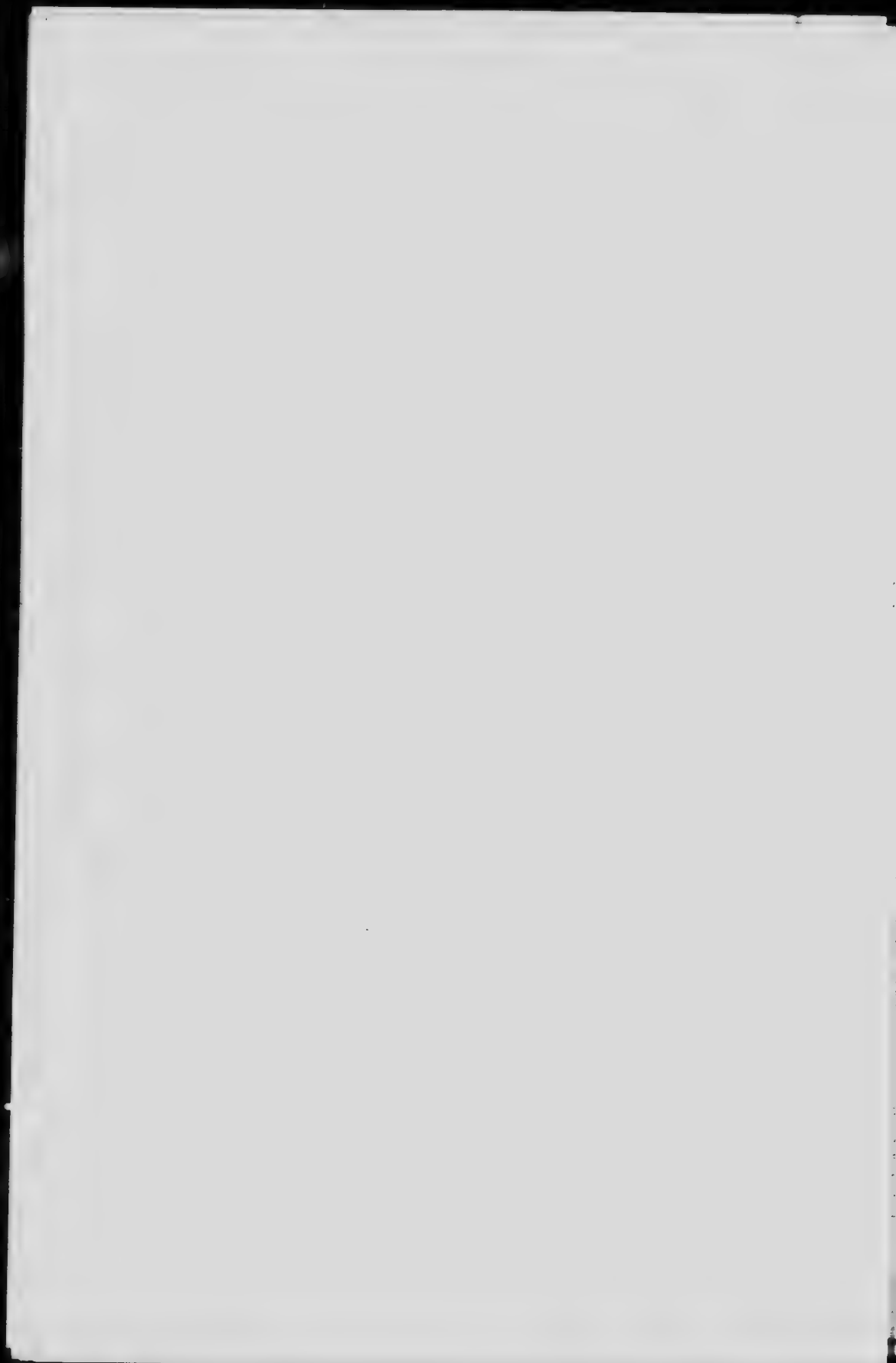
La Rochefoucault, who visited Upper Canada in 1795, says that York had only about twelve houses, and "the inhabitants, they say, have not the best character in the world"—"les habitans n'y sont pas, dit-on, de la meilleure espèce:"¹¹ but he never visited York and

⁹ By Russell in a letter to Simcoe from Niagara, September 13, 1797, Wolford Manor Papers, Book 8, p. 305; this estimate of him is confirmed by Powell in some of his MSS.—and by the conduct of Elmsley himself—Russell alone could not be considered sufficient authority; he was far from unprejudiced.

¹⁰ In a letter to Prescott from Niagara, August 20, 1796, Wolcott Manor Papers, Vol. 8, p. 332.

¹¹ Simcoe had given directions for erecting Parliament Buildings but the work was far from completion: these were the buildings destroyed by the Americans in 1813.

¹² See my Edition of La Rochefoucault's Travels published by the Ontario Archives, 1917, pp. 61, 159.



his "dit-on" came from Newarkers and therefore must be taken *cum grano salis*.

Several of the officials—the Chief Justice being the leader—privately urged Russell to retain Newark as the Capital and call the Legislature to meet there: he was loyal to Simcoe and moreover was building a residence for himself at York and he stood firm. The unfinished house was burned, January 25, and the Chief Justice renewed his request: Russell was not so firm and wrote ¹² at full length to the Duke of Portland, the Secretary of State for War and the Colonies, setting out the isolation of York from bad roads, and that he despaired of finding accommodation for the members of the two Houses, that juries would be difficult to get, &c., &c.—he added that he would defer coming to a formal decision in hopes that he might receive some command in the matter by the Winter express, or at least before he should issue a Proclamation for the meeting of Parliament.

The Chief Justice then sent a formal communication ¹³ to Russell, which reads as follows:—

"CONDITION OF YORK.

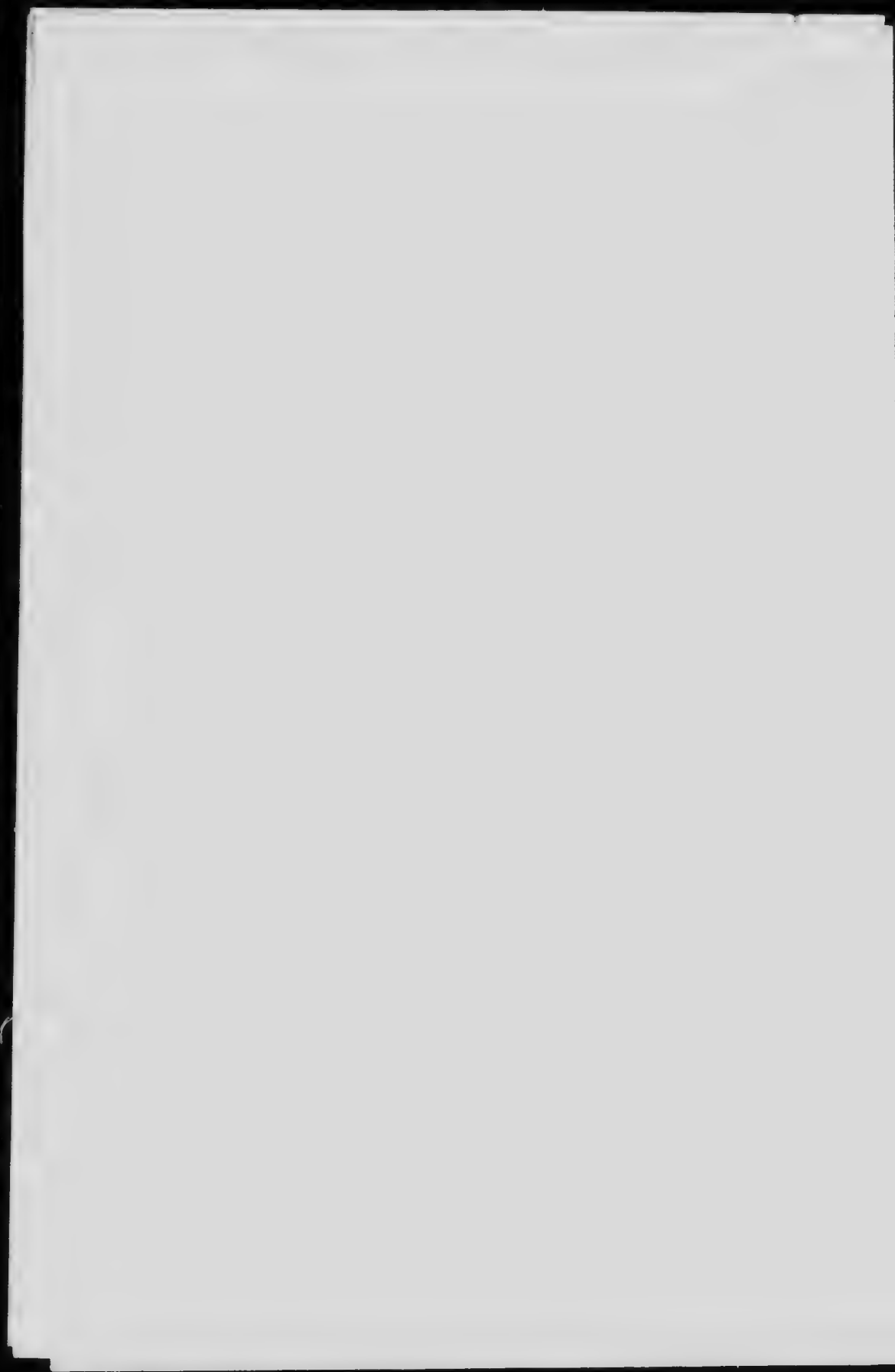
Newark, February 22nd, 1797.

SIR,—It is not without some degree of pain that I feel myself called upon by the duty of my station in this Province to request Your Honour's attention to a matter of the utmost importance to the Administration of Justice in it.

Your Honour knows that by Stat. 34 Geo. 3 c. 2, the Court of King's Bench, and the sittings for the Home District are until the Seat of Government is fixed, to be held at the place, where the Legislature was last assembled. On my arrival here in November last, I was informed that no place had yet been definitively fixed upon as the future Capital of the Province; but that in the meantime, the Courts of Justice and the different offices of the Government were to be removed from this place to the Town of York, and that His Excellency, General Simcoe, had left instructions with your Honour to convene the Legislature there. What the object of this measure, so far as the Courts of Justice are concerned is, I have never heard: but be it what it may, it is my duty to request of your Honour, that the execution of it may be

¹² From "West Niagara," February 1, 1797. Canadian Archives, Q. 283, p. 99.

¹³ Canadian Archives, Q. 283, p. 117. See also Wolford Manor Papers, Vol. 8, p. 372.



suspended, at least until His Majesty's pleasure is known on the subject.

The Town of York is as your Honour knows near forty miles beyond the most remote of the settlements at the head of the lake, and the road to it lies through a tract of country in the possession of the Missasagues. Besides this there is at York neither gaol nor court house, no accommodation whatever for Grand or Petty Jury, none for the suitors, the witnesses or the Bar, and I believe, but very indifferent for the Judges, so that the greater part of those whom business or duty may call to York, must remain, during their stay there, either in the open air, or crowded together in huts or tents, in a manner equally offensive to their feelings and injurious to their health. When to these circumstances your Honour adds that some of the Petty Jury (to say nothing of Grand Jurors), may be called from the distance of sixty or even eighty miles, and cannot be supposed to be absent from their own homes for less than ten days, you will immediately perceive that there is no fine which it would be prudent, or indeed, in the present circumstances of the Province just to impose as the penalty of absence, which a man, who might otherwise want no inclination to discharge a public duty, will set in the scale against the fatigue, the expense, the loss of time, and the personal inconvenience of attendance. So strongly am I persuaded that this will be the case, if the sittings are removed to York, that I do not expect to be able to form a jury there; and unless I have been much misinformed, any interruption in the course of justice as at present by law established, will from causes which I need not bring to your Honour's recollection, be of the most pernicious tendency—there being now several causes in Court, which ought to have been tried last summer, but which if the Courts are removed to York, will probably remain untried for another year, and for anything I can foresee for several years to come.

To point out to the Executive Government of the Province, the effects which the measure in question may by possibility have on the administration of justice, I conceive to be the more immediate duty of the station I have the honour to fill in it. I am, therefore, most respectfully, but most earnestly to request, that unless your Honour has His Majesty's express commands on the subject unless there are considerations of greater weight in favour of measure than those I have suggested against it, your Honour will be pleased to call the next meeting of the Legislature at this place, which will, of course, keep the Courts here also. Should either of these reasons make it impossible for your Honour to alter your present intention, I shall feel it a necessary, though painful duty, to request that I may be permitted to bring in a Bill as early as possible in the session for the purpose of continuing the Courts at this place, until a situation as easy of access and as convenient is provided for them elsewhere. I have the honour to be with greatest respect.

Your Honour's most obedient servant,

(Signed.) JOHN ELSLEY, C.J."

Russell at once communicated " with Portland, taking occasion to express his opinion that York was "the most eligible situation on the Lake for the seat of Government, as being a port of commodious access from all parts of it, out of reach of immediate insult and capable of defence from any hostile attempt by land or water, being also sufficiently central for a land communication with each extreme of the Province."

No answer could be expected for many months, and it was impossible to leave the matter open—the Chief Justice insisted that the question should be brought before the Executive Council. Russell laid it before the Council, and to the dismay of the Chief Justice every member but himself voted for York.

Parliament was accordingly called for York and sat there June 1, 1797. The Chief Justice had bought the house of Colonel Robert Pilkington at Newark, which had been occupied by John White, the first Attorney-General, and spent a large sum—said to be £1,500—in improvements and was determined not to move. When he found that Russell could not be influenced to keep the capital at Newark, he asked leave to bring in a Bill in the Legislative Council (of which he was Speaker) to retain the Court at Newark for two years. This was refused, but Russell allowed him to bring in a Bill enabling the Administrator to retain the Court there for a period of not more than two years—the Executive Council agreed that such a Bill might be introduced in Parliament. Instead of this Bill Elmsley had a Bill introduced and passed empowering the Administrator to retain the Court at Newark for two years, and also to fix the Assizes for the Home District there for the same time. Russell did not know of this until called upon to give the Royal assent to the Bill; he refused on the advice of the Executive Council and perhaps the Attorney-General.¹⁴

Elmsley never forgave Russell: thereafter as Russell complains, "he has endeavoured to thwart me on

¹⁴ Letter from Russell to Portland from West Niagara, February 26, 1797, Canadian Archives, Q. 283, p. 112.

¹⁵ Russell leaves this doubtful in his letter to Simcoe from Niagara, September 13, 1797, Wolford Manor Papers, Vol. 8, p. 395.



many occasions, and frequently forgets the respect he owes to my present station."¹⁶

But he knew a more certain form of revenge: Russell after he became Administrator continued the practice followed by Simcoe, and gave himself a Commission to sit as puisne Justice of the Court of King's Bench with the accruing profits of £500 sterling per annum. Elmsley on his arrival in the autumn of 1796 being spoken to by Russell as to this, had no objection, "but would on the contrary be pleased with it, and my friends here advise me to solicit the situation as the only probable means I may have of procuring an income upon which I can possibly live in this dear country."¹⁷ But while Russell sat without objection through Easter Term, April, 1797, when Trinity Term came and the Court sat at York July 1797, the Chief Justice demanded to know by what right he gave himself a Commission. While Russell sat during most of this Term with Elmsley, the Chief Justice was so offensive that Russell did not sit for the last two days of Term—and he never ventured to give himself a Commission thereafter. Russell complained to Portland, and was told that he was now receiving a sufficient salary and he should not try to sit as a Judge being also the Executive.¹⁸

Elmsley's hopes of a return of the Capital to Newark were dashed by the receipt by Russell of a despatch from Portland that "the selection of York for the capital was made upon the most mature reflection."¹⁹ And the Court remained at York as well. It may be mentioned that when Osgoode Hall was built, and it was arranged (1831) that the Court should sit there, the Hall was not in the Town of York, which came only north to Lot (now Queen) Street, but was in the Township of York: it was necessary to obtain

¹⁶ See letter mentioned in note 14.

¹⁷ See letter Russell to Simcoe, Niagara, December 31, 1796, Wolford Manor Papers, Vol. 8, p. 358.

¹⁸ The last previous time at which the Head of State attempted to sit as a Judge was probably in the times of James I.

¹⁹ Canadian Archives, Q. 283, p. 132, letter from Portland to Russell, Whitehall, September 11, 1797.

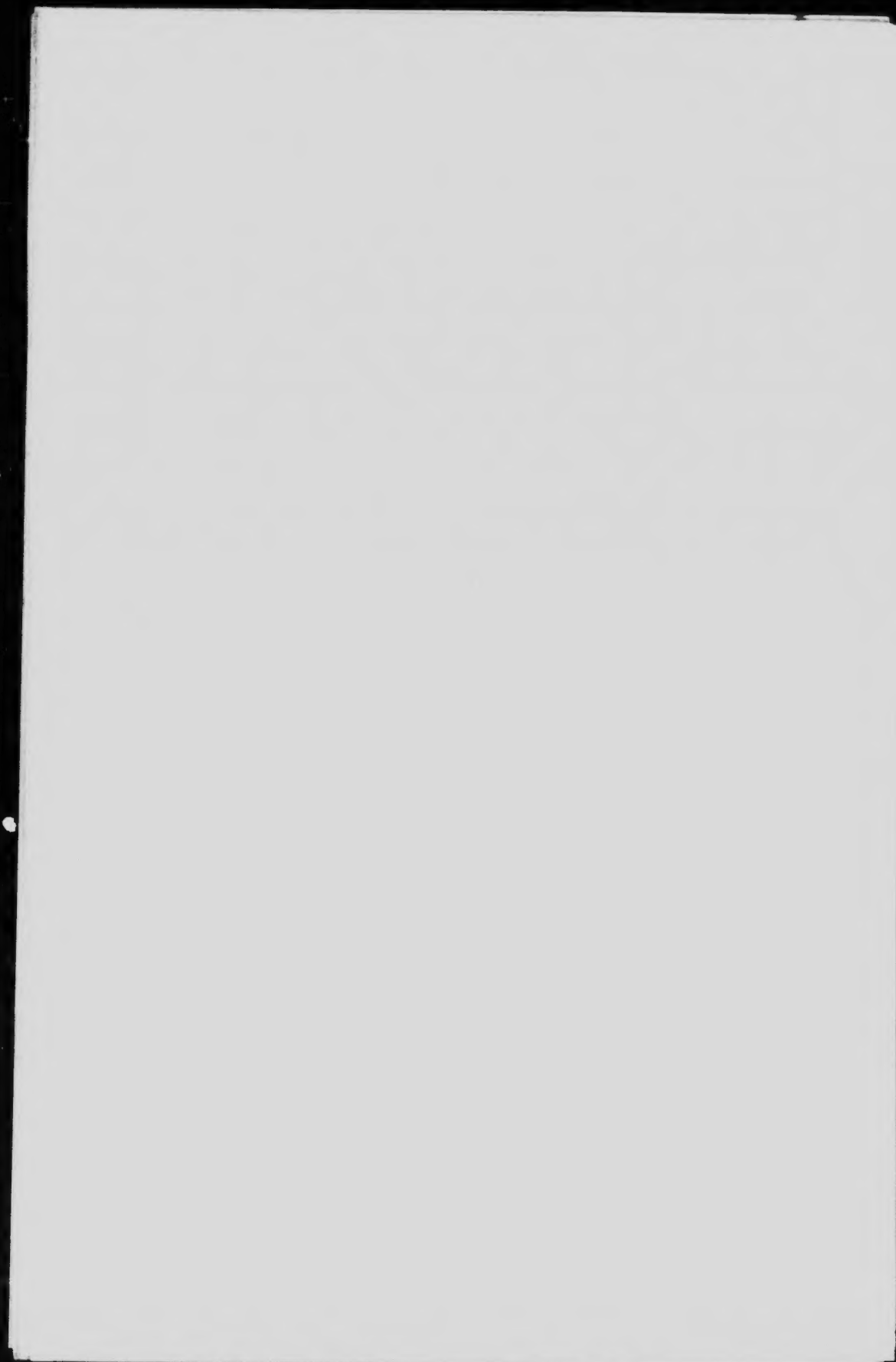
legislation to enable the Court to sit out of the Town of York, and the Act (1831) 2 Wm. IV, c. 8 (U.C.), was passed for that purpose.

WILLIAM RENWICK RIDDELL.

AUTHOR'S NOTE.—Some of the many disadvantages of the new capital may be learned from an official letter from the Administrator, Peter Russell, to Simcoe, then living in England. Writing from York, Upper Canada, December 9, 1797, he says:—

"I have the pleasure to inform your Excellency that I arrived here on the 30th ult., with my family and my effects, which were with great difficulty and some damage ~~lost~~ on shore, as a violent storm of wind, rain and snow came on immediately after, and has continued almost ever since with very little intermission, accompanied by a most intense frost; so that our harbour is now completely blocked up for the winter, and I am not without apprehensions that the inhabitants of this settlement may suffer for want of flour, as their expected supplies of that article have been cut off by this early visit of hard weather. Boards and scantling are likewise very scarce here, and not to be procured now from the mills. I am in consequence wholly uninclined, and without covering for my horses, oxen or poultry, and what is still worse, my friend, Mr. McGill, has, very unlike a friend, neglected to lay in hay for me although he was early requested to do so, and I cannot procure a sufficiency for their support at any price. The Attorney-General [John White], and Mr. Smith [Acting Surveyor-General], have by ver, great exertions got themselves housed, the latter pretty comfortably. But Mr. Jarvis [Provincial Secretary], not having made the smallest effort for the removal of his office, remains still at Niagara, and most probably means to do so until your Excellency's arrival. The two wings to the Government House are raised with brick and completely covered in. The south one being in the greatest forwardness I have directed to be fitted up for a temporary Court House for the King's Bench in the ensuing term [the Court sat there till the buildings were burnt by the Americans in 1813], and I hope they may both be in a condition to receive the two houses of Parliament in June next. I have not given directions for proceeding with the remainder of your Excellency's plan for the Government House, being alarmed at the magnitude of the expense which Captain Graham estimates at £10,000. I shall, however, order a large kiln of bricks to be prepared in the spring and burnt (as they will readily sell for what they cost, if the Government does not want them), and boards and scantling may be cut and seasoned upon the same principle. But I sincerely hope to have the pleasure of seeing your Excellency here before we shall have occasion to proceed further with the building.

I have extended this town [at that time near the mouth of the Don], westward towards the garrison, and to the north as far as



the base [Lot Street now Queen Street], of the hundred acre lots reserving between the part that was laid out by your Excellency, and this addition, a large space for public buildings (viz., a church, Court House, jail, market, hospital, school house, etc.); most of the lots have been already taken up and about forty houses erected and several more are beginning.

The huts at the garrison requiring considerable repair to render them habitable in winter, I have caused the Block House (which your Excellency originally intended to place on the peninsula) [the present Island was made by a storm in the 50's breaking through the neck of the peninsula at what we now call the 'Eastern Gap'], to be raised on the knoll on this side the Garrison Creek, and fitted as a barrack for 70 men. On the top of it is put a light house, which renders it a convenient and conspicuous object to guide vessels into the harbour. Upon the whole I flatter myself your Excellency will not be displeased with what I have done at this place.

I have been very chaste in my selection of inhabitants for the Long Point settlement [on Lake Erie], and I am happy to inform your Excellency that in the late alarm of invasion no less than 160 young men turned out volunteers from it. As the militia wanted organization I appointed Captain Rierse [Samuel Ryerse, afterwards Lieutenant-Colonel of Militia], (being of most respectability), to be Lieutenant for the County of Norfolk, and he has shown great zeal in the duties of his station.

The British merchants at Detroit [the British evacuated Detroit, August, 1796], having solicited me to give them a town on that river, where they may reside and carry on their trade with equal convenience, I purchased from the Indians the gore near the Huron Church for their accommodation, and named it Sandwich, and I am informed that several houses have been already built there, and that it promises fair to become soon the most beautiful town in the province.

I am sorry to observe to your Excellency that we are miserably off for churches and clergymen. Mr. Raddish, who came out with the Chief Justice [Elmsley] very strongly recommended by the Duke of Portland, was named by me at his own desire for this place. He has since returned with my leave to Europe, and I very much hope he may come back to us as he is an excellent preacher and an agreeable man. I have recommended to the Bishop that of the £1,000 voted for building churches in this province half may be appropriated to York and £200 each to New Johnston [by Cornwall] and Sandwich, and the remainder to New-ark [Niagara-on-the-Lake]. But His Lordship has not yet favoured me with an answer.

In a letter I have lately received from Mr. Osgoode [who had gone to Lower Canada in 1794 as Chief Justice], he advises me to solicit the Lieutenant-Governor of this province in case your Excellency should not incline to return to it. But though I very much want the income to enable me to live in this country, and would be very happy to get rid of the great charge and responsibility of the Receiver-General's office, I yet fear to make a



request of that nature without more powerful support than I can now expect, after the loss of almost all my friends. Should His Grace the Duke of Portland think me, however, worthy of that high honour, I should accept it with gratitude and do my best not to disgrace the appointment.

I have much more to say to your Excellency, but as I can have no certainty that this letter will ever reach you (having no means of sending it, but by the common post through the States to New York), I shall defer it until the winter express. In the meantime should it fortunately reach your hands, I beg you will do Miss Russell (who survived him and got all his property) and me the honour of presenting our respects and best wishes to Mrs. Simcoe and accepting the most sincere regards of, dear sir,

Your Excellency's most faithful and obliged servant,

PETER RUSSELL.

His Excellency General Simcoe, etc., etc., etc.

[Wolford Manor Papers, Book 8, p. 410.]